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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant*,
v.
BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF FOR APPELLANT

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No. 75-1868

National Geographic Society, *Appellant*,

v.

Board of Equalization of the State of California, *Appellee*.

On Appeal from the Supreme Court of California

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 547 P.2d 458, 128 Cal. Rptr. 682 (1976) and is printed as Appendix A of the Jurisdictional Statement. The opinion of the Court of Appeal of the State of California, First Appellate District, is unofficially reported at 121 Cal. Rptr. 77 (1975) and is printed as Appendix B of the Jurisdictional Statement.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). This appeal challenges the validity of requiring the National Geographic Society (hereinafter "Society") to collect and pay over California's use tax (California Revenue and Taxation Code §§ 6201-6204, set forth below) on its mail-order sales to California residents on the ground that imposition of

use tax collection liability on such sales is repugnant to the Constitution of the United States.

In 1964 the Board of Equalization of the State of California (hereinafter "Board") notified the Society that it was obligated, under California Revenue and Taxation Code § 6203, to collect use taxes on merchandise sold by mail to California residents, and that, since the Society had not collected such taxes, it was liable for an equivalent sum under § 6204. The Society paid the assessment under protest and brought an action in the San Francisco Superior Court seeking a refund, claiming that the imposition of use tax collection liability was violative of the Due Process Clause and the Commerce Clause of the Constitution of the United States. After trial without a jury and upon stipulated facts, the Superior Court entered an amended judgment in favor of the Society and ordered the Board to refund $3,864.33.

On appeal to the Court of Appeal of the State of California, First Appellate District, this judgment was unanimously affirmed on March 26, 1975. On April 25, 1975, a petition for rehearing was denied. On appeal, the Supreme Court of California, IN BANK (sic), reversed the judgment on April 1, 1976 and remanded for entry of judgment in favor of the Board. Timely notice of appeal to this Court was filed in the Supreme Court of California on June 17, 1976. This Court noted probable jurisdiction on October 12, 1976. Its jurisdiction rests on 28 U.S.C. §§ 1257(2) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

This case also involves California Taxation and Revenue Code, §§ 6201-04, 6362, set forth below:

6201. *Imposition and rate of use tax.* An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1 ,1967, and to and including June 30, 1972, and at the rate 3¾ percent thereafter.

6202. *Liability for tax.* Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

6203. *Collection by retailer.* Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the

storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

6204. *Tax as a debt.* The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

6362. *Newspapers and periodicals.* (a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

QUESTIONS PRESENTED

1. Whether imposing use tax collection liability upon an out-of-state organization, which has no retail outlets or retail sales solicitors within the taxing state and whose only contact with customers in the state is through the United States mail, violates the Due Process Clause and the Commerce Clause.

2. Whether the existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the California statute (California Revenue and Taxation Code §6362(a)) and which are dissociated from the transactions sought to be taxed, provides the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales.

3. Whether the "slightest presence" test formulated by the California Supreme Court conflicts with

this Court's decision in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954) and other cases decided by this Court.

4. Whether the substantiality of an out-of-state seller's mail order sales within a state attempting to impose use tax collection liability on the seller is of any significance in determining whether the imposition of the collection liability is constitutional.

STATEMENT

The Society seeks review of a holding of the Supreme Court of California in favor of the Board rendered on April 1, 1976, in an action brought by the Society to recover certain asserted use tax collection liabilities paid by the Society to the Board under protest and for a declaration of nonliability for use tax collection.

Statement of Facts

The National Geographic Society is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N.W., Washington, D.C. The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register.

The Society is exempt from federal income taxation by reason of section 501(c)(3) of the Internal Revenue Code of 1954, as amended. (26 USC § 501(c)(3)).

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890, the Society has supported explora-

tion and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly journal, the National Geographic (hereinafter referred to as "magazine" or "National Geographic") its offerings of maps, atlases, globes, books, and through school bulletins, film strips, television programs and research reports.

The magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent of the total circulation.

Membership in the Society is open to all persons. The majority of such members join the Society because they desire to obtain the magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington, D.C. area. Members presently pay $8.50 a year for membership in the United States, in exchange for which they receive one year's subscription to the magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indices); however, they do have the opportunity to purchase items published by the Society from its offices in the Washington, D.C. area.

Non-member subscribers to the magazine (the schools, libraries, bookdealers and corporations referred to above) must pay $10.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

As of June, 1972, there were approximately 872,000 member subscribers and 21,000 non-member subscribers in California.

The National Geographic is exempted from the California Sales and Use Tax as a "periodical" by the California Revenue and Taxation Code § 6362.

The Society announced offerings of maps, atlases, globes and books in the magazine and by circulars mailed to members and subscribers from outside California. To take advantage of these offerings, an order form enclosed with the mail circulars or an order coupon in the magazine is removed, completed and mailed to the administrative offices of the Society in the Washington, D.C. area. Deliveries of such publications are then made through the U.S. mail directly from the Society's Washington, D.C. area offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise.

Since 1956, the Society has maintained two offices in California. One such office has been on the 10th floor of the 31-story Russ Building in San Francisco. Until 1965, the other was on the second floor of a two-story building at 8639 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and a secretary.[1]

[1] In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two salesmen and two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970. (It should be noted that these salesmen solicit only advertising copy, which is accepted or rejected in Washington, D.C.).

During the period from August 1, 1963 through May 6, 1964, a small number of maps, atlases, globes and books were sold to individuals over the counter from the San Francisco and Los Angeles offices in the amounts of $679.20 and $2,161.85, respectively.[2]

The Society paid to the Board state and local sales taxes, plus appropriate penalties and interest, on over the counter sales described above totaling $546.20 during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising copy for the magazine.

During the period from April 1, 1964 to September 30, 1964, the Society made sales through the U.S. mail of maps, atlases, globes and books to California residents from its Washington, D.C. area offices in the manner described above in the sum of $83,596.48.

Based upon the mail order sales described above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	State and Local Use Tax Collection Liability With Interest and Penalties
4/1/64-6/30/64	$45,156.36	$2,085.90
7/1/64-9/30/64	$38,440.12	$1,752.86

[2] All local sales were regarded as *de minimus* by the California Court of Appeal and were disregarded for purposes of its decision by the Supreme Court of California.

All California mail order sales were accepted in the Washington, D.C. area and mailed into California. At no time were the advertising solicitation offices of the Society in California in any way involved in these mail order sales.

The Society sells globes, atlases, books and maps to its members, on orders mailed from all over the world to its headquarters in the Washington, D.C. area. These mail order sales are an important means by which the Society achieves its educational and scientific purposes of increasing man's geographic knowledge of the earth, sea, sky and universe, referred to above.

How The Federal Questions Were Raised And Decided Below

The Society's Claim for Refund filed on September 27, 1966 was based on the grounds that imposition of use tax collection liability on the Society violated due process and constituted an undue burden on interstate commerce, and that the Society was not a "retailer" (as defined in California Taxation and Revenue Code, § 6203).

In its suit in the Superior Court of California, the Society also argued that the imposition of use tax collection liability on its mail-order business was in violaton of the Due Process Clause and Commerce Clause of the United States Constitution for the reason that there was insufficient "nexus" between the State of California and the Society to permit the State of California to impose the use tax collection liability on the Socety's out-of-state mail-order sales. The Superior Court entered judgment (and an amended judgment) in favor of the Society.

In the appeal to the California Court of Appeal, that court adopted the Society's statement of the question presented as the sole issue to be decided: "The sole question presented in this case is whether [the Society's] activities in the State of California provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by [the Society's] gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964."

The court then stated the Board's contentions as follows:

> "During the time period for which the Board seeks the use taxes, the Society's sole contacts in California were the maintenance of two small offices in the state, each of which was staffed with a secretary and a salesman whose purpose was to solicit advertising to appear in the Magazine. The Board contends that the maintenance of the two offices for even that limited purpose subjects the Society to payment of use taxes on the mail order sales made outside the state to residents of the state. The Board contends that the imposition of the tax collection does not violate either the due process clause or the commerce clause of the United States Constitution." [footnote omitted]
>
> App. B of Jurisdictional Statement at pages 21a-22a.

The unanimous decision of the appellate court squarely rejected the Board's contentions:

> "However, the question must also be asked whether the Society's in-state activities were connected with the out-of-state sales. No real link may be established between the two. The Society main-

tained two small offices in California. A function of the secretary and salesman in each office was to solicit businesses to advertise their merchandise and services in the Magazine. The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars.

* * *

"The Society's activities in California are so dissociated from the activities sought to be taxed that there is no justiciable relationship between the two.

"The soliciting in California of advertising for the Magazine does not provide the minimal nexus which is required for this state constitutionally to impose use taxes on the Society's mail order sales to California residents."

App. B of Jurisdictional Statement at pages 26a, 33a.

After the Board's petition for rehearing was denied by the Court of Appeal, the Board filed a Petition for Hearing before the Supreme Court of California.

In its opinion, the Supreme Court of California stated the question before it as follows:

> "Essentially our task is to decide whether the activities of the Society in California constitute a sufficient nexus between this state and the Society so as to justify against constitutional attack the imposition of a use tax collection liability in respect to certain merchandise purchased by California residents by mail orders to the Society's out-of-state offices."
>
> App. A of Jurisdictional Statement at page 1a.

In rejecting the opinion of the Court of Appeal, the California Supreme Court formulated a principle it felt applicable to all such cases, and concluded as follows:

> "We are satisfied that from the above cited decisions the following principle can be distilled and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, *the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.*
>
> * * *
>
> "We conclude that the imposition of use tax collection liability on the Society violates neither the due process clause of the Fourteenth Amendment to the United States Constitution nor the Commerce clause of said Constitution." (emphasis added)
>
> App. A of Jurisdictional Statement at pages 8a, 16a.

SUMMARY OF ARGUMENT

A state may not impose use tax collection liability on an out-of-state seller with respect to its mail order sales if the seller has engaged in no in-state, sales-related activities.

The National Geographic Society has no in-state, sales-related activities to warrant the imposition of a use tax liability for its mail order sales.

The existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the state and which are dissociated from the transactions sought to be taxed, does not provide the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales.

The National Geographic Society has no in-state connection with customers as is required by *National Bellas Hess* for the imposition of use tax collection liability.

The advertising solicitation activities of the National Geographic Society are clearly dissociated from the interstate mail order sales of the Society to California customers.

ARGUMENT

I. A STATE MAY NOT IMPOSE USE TAX COLLECTION LIABILITY ON AN OUT-OF-STATE SELLER WITH RESPECT TO ITS MAIL ORDER SALES IF THE SELLER HAS ENGAGED IN NO IN-STATE, SALES-RELATED ACTIVITIES

This case presents the simple question of whether the California Supreme Court may disregard the applicable decisions of this Court and impose use tax collection liability on the National Geographic Society with respect to its out-of-state mail order sales, when the Society had no activities in the state of California related to such sales. As construed by California's highest court, the California Revenue and Taxation Code's, §§ 6203 and 6204, enable the State of California to impose a use tax collection liability on any out-of-state mail order seller whenever there is the "slightest presence" of the seller in California, regardless of whether that "slightest presence" has

any connection with the seller's out-of-state retail mail order activities. Such a test goes far beyond the limits set by this Court in prior cases, for this Court has upheld the imposition of use tax collection liability on mail order sellers (*i.e.* has found a constitutionally valid "nexus" between the state and the mail order seller's activities) *only* when the seller has engaged in activities within the taxing state which are related to the seller's out-of-state mail order activities.

In *no* case has this Court upheld use tax collection liability where the out-of-state seller has confined its sales-related activities exclusively to instrumentalities of interstate commerce. In the absence of local, in-state contact with customers, the "definite link" between the "state and the person, property or transaction it seeks to tax" (*Miller Bros* v. *Maryland,* 347 U.S. 340, 344-345 (1954)) is lacking and the constitutionally valid "nexus" to support use tax collection liability does not exist.

This requirement of an in-state "connection with customers" was made abundantly clear in this Court's most recent use tax collection liability case—*National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967). In applying the constitutional principles of the Due Process Clause and the Commerce Clause, the Court noted that it has upheld the power of a state to impose collection liability in a variety of circumstances but that it "has *never* held that a State may impose the duty of use tax collection and payment upon a seller whose *only connection with customers* in the State is by common carrier or by United States mail." (Emphasis supplied.) In recognizing that this distinction has been consistently applied, the Court stated (386 U.S. at p. 758):

* * *

"Indeed, in the Sears, Roebuck case the Court sharply differentiated such a situation from one where the seller had local retail outlets, pointing out that 'those other concerns . . . are not receiving benefits from Iowa for which it has the power to exact a price.' 312 US at 365, 85 L ed at 892, 132 ALR 475. And in Miller Bros. Co. v. Maryland, 347 US 340, 98 L ed 744, 74 S Ct 535, the Court held that Maryland could not constitutionally impose a use tax obligation upon a Delaware seller who had no retail outlets or sales solicitors in Maryland."

In *National Bellas Hess*, Illinois had sought to impose a use tax collection liability on Hess' mail order business based in Kansas City, Missouri. The basis cited by Illinois for imposing a use tax collection liability on Hess' mail order sales was the mailing into Illinois by Hess of its catalogues and advertising flyers. This was regarded by Illinois as being an exploitation of the Illinois market sufficient to result in "nexus" between Illinois and Hess, notwithstanding the absence of *in-state* sales activities by Hess.

In its review, this Court noted that all of Hess' contacts with Illinois were via the United States mail or common carrier, and accordingly, held that, lacking any in-state retail contact with the Illinois consumers, Hess could not be held liable by Illinois for the use tax. The basic distinction between exclusively interstate contact with customers, and in-state sales activity, was considered valid and the Court declined to obliterate this distinction. 386 U.S. at p. 758.

It is this distinction that the California Supreme Court has disregarded in the instant case, as the Illinois court sought to disregard the same issue in *National Bellas Hess*. The National Geographic Society has absolutely no in-state contact with the California customers who purchase products of the Society exclusively by means of interstate facilities. Yet, because of the existence in California of two offices of the National Geographic Society which merely solicit national advertising for the National Geographic, the California Supreme Court maintains that this *admittedly non-sales-related activity* of the Society is sufficient to justify the imposition of a use tax collection liability on the Society's mail order sales. The California court has simply chosen to ignore the clear language of this Court in *National Bellas Hess* and predecessor cases.

In *each* case where this Court has sustained a sales-related tax, there has been substantial local involvement of in-state contact with customers. In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1941), the state of Iowa was permitted to impose its use tax on the mail order sales of Sears Roebuck where that company had 12 retail stores in-state and was qualified to do business in the state. In addition to the in-state retail activity of Sears, the record before the Court also reflects that, although Sears agents in Iowa did not actually solicit or place mail order sales, the in-state stores assisted in the processing of such orders. These orders were considered by the Court as "a part of" Sears' business in Iowa. It held that Sears could not avoid the tax because its "business [obviously referring to its retail sales business] was departmentalized." In light of the extensive in-state retail activity of Sears, the Court stated that Iowa could rightly assume that Sears' mail order sales were not unrelated to Sears' course of business in Iowa. Because Sears had

been extended the privilege of doing business in Iowa, the Court held that Iowa was not incapable of reaching Sears for the tax on mail order sales, and could "exact this burden as a price of enjoying the full benefits flowing from its Iowa business." 312 U.S. at p. 364.

In *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373 (1941), a substantially identical companion case to *Sears Roebuck & Co.*, there was present a further fact which, in the Court's opinion, required upholding the imposition of the Iowa use tax on Montgomery Ward's mail order sales. Montgomery Ward's retail stores had engaged in local advertisements of the mail order merchandise which the Court regarded as being the equivalent of in-state solicitation by local agents. Local solicitation of orders had been previously held as being in-state, sales-related activity which justified a sales-related tax on mail order sales. See *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62 (1939). Likewise, Montgomery Ward processed some mail orders over the counter in its Iowa retail stores.

Subsequent decisions of this Court have reaffirmed the principle that there must be in-state sales-related activities to support a use tax collection liability. In *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335 (1944), the property on which the use tax was laid was sent into Iowa, the taxing state, as a result of orders solicited by traveling salesmen sent into Iowa from the company's Minnesota headquarters. The Court deemed this local activity sufficient to sustain collection liability for such use tax.

Similarly, in *Scripto* v. *Carson,* 362 U.S. 207, decided in 1960, the presence of in-state, independent wholesalers, or jobbers, who solicited orders for mail order sales of Scripto's products was determined to be a sufficient local activity to justify the imposition of the Florida use tax collection liability on the mail order sales. In fact, as the Court noted, the only incidence of the sales transaction that was non-local was the acceptance of the order. The test, stated the Court (362 U.S. p. 211-212) is "simply the nature and extent of the activities of [Scripto] in Florida;" the "continuous local solicitation" (362 U.S. at p. 211) by Scripto's representatives provided the required "minimum connections". The Court again repeated the requirement previously set forth in *Miller Brothers* that there must be an in-state "exploitation of the consumer market" before use tax collection liability may be constitutionally imposed.

In the early cases in this Court involving sales-related taxes, there was always clear in-state retail activity. See, e.g., *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra* (local retail sales agents); *Bowman* v. *Continental Oil Co.,* 256 U.S. 642 (1921), (local distributor and dealer); *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86 (1934), (local refining, storage and distributing facilities).

Notwithstanding this Court's consistent requirement of a local sales-related connection between the state and the transaction or activity sought to be taxed, the California Supreme Court has enunciated a new test that the "slightest presence" of a seller within a taxing state will permit that state constitutionally to impose a use tax collection liability on out-of-state mail order sales. There can be little doubt that this "slightest presence" test is in direct conflict with the "defi-

nite link" test expressed in *Miller Brothers,* and with the requirement set down by this Court in that case that there be an "invasion or exploitation of the consumer market" by in-state activities before use tax collection liability can be imposed.

In 1954, this Court held in *Miller Brothers* v. *Maryland,* 347 U.S. 340, that Maryland could not constitutionally impose its use tax upon a Delaware-based furniture store where the seller's *only* contact with Maryland was the occasional delivery of goods sold at its Delaware store into Maryland by the seller's own truck. In reviewing the principles governing local taxing authority, it was stated (347 U.S. at p. 344-345):

> ". . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

The Court distinguished cases involving traveling sales agents (e.g., *General Trading Co.* v. *State Tax Commission, supra*) which, in its judgment, constituted "active and aggressive operation within a taxing state," from the "occasional delivery of goods" in-state which did not, in the Court's opinion, constitute "invasion or exploitation of the consumer market in Maryland." In the absence of such "invasion or exploitation of the consumer market," it was held that the "minimum connection" to justify the imposition of a use tax liability was lacking.

II. THE NATIONAL GEOGRAPHIC SOCIETY HAS NO IN-STATE, SALES-RELATED ACTIVITIES TO WARRANT THE IMPOSITION OF A USE TAX LIABILITY FOR ITS MAIL ORDER SALES

A. The existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the state and which are dissociated from the transactions sought to be taxed, does not provide the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales

The Supreme Court of California held that the "slightest presence" within the state, without regard to the nature of that presence, permits the state constitutionally to impose on a mail order seller the duty of collecting the use tax from mail order purchasers and the liability for failure to do so. A long line of cases in this Court, however, has held that only where the "presence" of an out-of-state seller manifests itself through retail outlets or in-state retail solicitors for the sale of tangible personalty may the state constitutionally impose such a duty; and a sharp distinction must be drawn between "mail order sellers with *retail* outlets, solicitors or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1967) (emphasis added.) Moreover, if a seller's activities within the state are dissociated from the activity sought to be taxed, then no constitutionally sufficient "nexus" for imposition of the tax exists. See, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965); *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951).

The California Supreme Court concluded that since the Society maintains an "office" within California

—the two offices from which the Society solicits advertising for its tax-exempt magazine—it falls within California Revenue and Taxation Code, § 6203, and has the duty of collecting use taxes on its mail order sales. The mere existence of an "office" in California does not automatically make imposition of the use tax collection liability constitutional.[3] There must be some connection—"some definite link" in the words of *Miller Bros. Co.* v. *Maryland, supra*—between such an office and the out-of-state sales; in the instant case, that connection is lacking. The California Supreme Court in attempting to show some "slight presence"

[3] In *Montgomery Ward and Co., Inc.* v. *State Board of Equalization*, 272 CA2d 723, 78 Cal. Rptr. 373 (Ct. App. 1st Dist. 1969), *petition for hearing denied* (Sup. Ct. Calif., August 6, 1969), *cert. den.* 396 U.S. 1040 (1970), the Court struck down the California use tax on certain out-of-state sales by Montgomery Ward and clarified the nature and quality of the constitutionally required nexus between the activity to be taxed and the taxing state. The Court held that due process was violated by the State of California requiring Montgomery Ward to collect use taxes on certain of its Nevada and Oregon sales to California residents, even though Montgomery Ward operated 21 retail stores in California and maintained its regional office in California. The Court states that:

> "California may not burden a foreign corporation's out-of-state business as a condition of permitting it to do business within the state. *The protection afforded and the benefits conferred must have some relationship to the transaction which the State seeks to burden.*" (emphasis supplied)

The fatal defect in the state's case was its failure to show that the intrastate activities contributed to the sales made by the border stores to residents of California. The Court stated *inter alia* that:

> "The existence of a regional headquarters in Oakland, with administrative jurisdiction over the border states, among others, is not determinative. There is nothing to show any particular contribution to the sales in question here. *Certainly the existence of this headquarters could not give California the right to tax or impose burdens on all sales in all states throughout the region.*" *Montgomery Ward, supra*, at 382-383. (emphasis supplied)

could point only to the two advertising offices. These two offices which the Society maintains in California are there solely for the purpose of soliciting national advertising copy, a non-tangible item, for the Society's magazine, which is tax-exempt under California law. These offices have never serviced in any way the Society's mail order sales.

The Supreme Court of California found that both the Society's magazine and the Society's mail order merchandise served the same purpose, i.e., to make information gathered by the Society available to its members. From this the court concluded that both media are *used* by California residents; therefore, the mail orders are a part of the Society's business in California. The court concluded that the Society's California business was merely "departmentalized" and, therefore, under the doctrine of *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1941), the Society was subject to the use tax collection liability.[4]

The holding in *Sears* does not support such a conclusion. In that case, imposition of the use tax was clearly justified and reasonable since the taxpayer was fully exploiting the consumer market through sales of tangible consumer products by local retail establishments. Such a local presence involving solicitation of tangible retail sales provides an appropriate nexus to justify imposition of the use tax when coupled with

[4] The Court of Appeal properly reached a contrary conclusion, stating:

> • • • The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars. (App. B. of Jurisdictional Statement at page 26a.)

qualification to do business in the state. In *Sears,* the in-state activities which supplied the nexus for the use tax were virtually identical to the out-of-state transactions sought to be taxed; the same products were sold to Iowa customers in both the mail order operation and the local retail operation, both being related to the same overall sales effort. In this case there is no similarity between the purchase of advertising space by national firms in the Society's exempt magazine (such sales to be consummated in Washington) and the sale of globes, books, maps and atlases by mail order in interstate commerce to California residents. The Society's solicitation of advertising is certainly not a retail function, and the facts of this case bear no resemblance to those in *Sears.*

As noted above, in the *Sears* case, the finding that mail order sales in Iowa were part of Sears' course of business in that state was clearly dependent upon the fact that Sears was qualified to do business in Iowa as a foreign corporation. The Court stated that Sears could not be reached for use tax if it were not qualified to do business in Iowa, because of the impotence of the state power, and recognized that other mail order firms not doing business as foreign corporations in Iowa could not constitutionally be subjected to this use tax.

A primary corporate purpose of the Society is to promote "the increase and diffusion of geographic knowledge." Necessarily, both the magazine and mail order merchandise sold by the Society attempt to accomplish that purpose. The California court's attempt to establish a connection between the magazine advertising solicitation activities of the Society's California offices and the Society's mail order sales because of this similarity in purpose ignores the separately distinct

nature and dissociation of the two activities. An excise tax case, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), is more analogous to the instant case than is *Nelson* v. *Sears, Roebuck & Co., supra,* and provides the best guidance in the situation where in-state activities are totally dissociated from out-of-state sales.[5]

B. The National Geographic Society has no in-state connection with customers as is required by *National Bellas Hess* for the imposition of use tax collection liability.

The Society's exclusive connection with its mail order sales customers is by means of interstate facilities. Offerings of maps, atlases, globes and books were announced in the Society's official journal, the National Geographic, which is sent only to its members (and a relatively small number of subscribing schools, libraries, bookdealers and corporations) and by circulars mailed from outside California to such members and subscribers. A prospective purchaser would take advantage of these offerings by completing an order form enclosed with the mail circulars, or an order coupon attached to the magazine, and mailing the form or coupon to the administrative offices of the Society in the Washington, D. C. area. Payment for the merchandise so ordered was either by cash with the order or by a mailed billing from the Washington, D.C. area headquarters following the purchaser's receipt of the merchandise. As can be readily seen, the United States mail was the exclusive contact between the Society and the California customers.

The "slightest presence" of the Society in California that the California Supreme Court seized upon as jus-

[5] See discussion of *American Oil* under heading III, *infra,,* at page 29.

tifying the imposition of the use tax liability was two national advertising solicitation offices for the magazine which the Society maintained in California. During the two quarters in issue, April 1, 1964 through June 30, 1964, and July 1, 1964 through September 30, 1964, both offices were staffed by a manager and a secretary.

The advertising offices have been maintained by the Society since 1956, and, with the exception of the short period from August 1, 1963 to May 6, 1964, they have been restricted in authority and function exclusively to the solicitation of national advertising copy for the magazine. During this August 1, 1963 through May 6, 1964 period, a small number of maps, atlases, globes and books were sold to individuals over the counter from the San Francisco and Los Angeles offices in the amount of $679.20 and $2,161.85, respectively.[6]

The appropriate taxes have been paid on these over-the-counter sales and no refund of these taxes is being sought by the Society.

During the two quarters in issue (April 1, 1964 through September 30, 1964), the Society made sales through the United States mail of maps, atlases, globes and books to California residents from its Washington, D. C. area offices in the manner described above in the sum of $83,596.48. All mail order sales were accepted in the Washington, D. C. area and mailed into California. At no time were the advertising solicitation offices of the Society in California in any way involved in these mail order sales. The position of the

[6] These local sales were regarded as *de minimus* by the California Court of Appeal and were disregarded by the California Supreme Court for purposes of its decision.

California Supreme Court that the advertising offices provided a sufficient nexus to tax the Society's mail order sales is, in substance, no different than saying that an in-state photographic or scientific expedition of the Society would constitute a sufficient nexus. The next logical step in the lower court's argument would be to say that the employment of, or contractual arrangement with, a scientist having an office in California or the sending of a single employee of the Society to California to examine a prospective site for a scientific or photographic expedition of the Society would be sufficient nexus to tax mail order sales.

The principle established by this Court in *National Bellas Hess* and its predecessor cases, that out-of-state mail order sales will be free from a local sales-related tax so long as the vendor abstains from any in-state sales-related activity, provides a logical and fair standard, as opposed to the patently unfair and illogical "slightest presence" test. In its attempt to reconcile its "slightest presence" test in the face of the in-state sales-related activity requirements, the California Supreme Court was compelled to paraphrase this Court's opinion in *National Bellas Hess:*

> "It is clear that where the out-of-state mail order seller's connection with the taxing state is *solely* by instruments of interstate commerce—e.g., by common carrier or the United States mail—the state has given nothing for which it can ask return. Indeed in *Nat. Bellas Hess*, the Supreme Court took pains to point out that it 'has never held that a State may impose the duty of use tax collection and payment' under such circumstances. (386 U.S. at p. 758, 87 S.Ct. at p. 1392.) Accordingly it held that Illinois could not constitutionally impose a use tax collection liability upon a mail order house whose principal place of business was in Missouri

> and whose only contacts with Illinois were by United States mail or common carrier since in the circumstances of that case it would amount to a tax on the privilege of doing interstate business and would be violative of the commerce clause." App. A of Jurisdictional Statement at page 7a.

The critical language of the California Supreme Court is the substitution of the phrases "connection with the taxing state" and "contacts with Illinois" for the language actually used by this Court in *Hess* (386 U.S. p. 758) of "connection with *customers.*" (Emphasis added.) In context, the language in *Hess* reads (386 U.S. at p. 758):

> But the Court has never held that a state may impose the duty of use tax collection and payment upon a seller *whose only connection with customers* in the State is by common carrier or the United States mail. (Emphasis added.)

This, we submit, is a key distinction which the California Supreme Court has obviously attempted to disregard. The stated requirement of this Court is that there be in-state contacts with *customers* before there can be a use tax liability for mail order sales, and that a totally non-sales-related contact by the out-of-state seller with the *state* will not suffice.[7]

[7] The Supreme Court of California also pointed to, but misconstrued, this Court's recent decision in *Standard Steel Co.* v. *Washington Revenue Department,* 419 U.S. 560 (1975), as supportive of its decision in the instant case. In that case the out-of-state seller's contact with the taxing state was the presence therein of one full-time engineer. The engineer, however. worked closely with the in-state customer and advised the customer as to what products it needed from the seller. Although the engineer did not take sales orders himself, by advising the customer as to its needs, he occupied a role little different from the travelling salesmen in *General Trading Co.* v. *Tax Commission,* 322 U.S. 335 (1944), or the local brokers, wholesalers and jobbers in *Scripto* v. *Carson,* 362 U.S. 207 (1960). The personnel in the Society's California offices have no contact of any kind with mail order customers of the Society, for the simple reason that those offices have no retail function related to mail order sales.

III. THE ADVERTISING SOLICITATION ACTIVITIES OF THE NATIONAL GEOGRAPHIC SOCIETY ARE CLEARLY DISSOCIATED FROM THE INTERSTATE MAIL ORDER SALES OF THE SOCIETY TO CALIFORNIA CUSTOMERS

The concept of the "dissociation" of certain activities of a commercial enterprise from its other activities has long been recognized by this Court as a basis for testing the constitutional validity of attempted state taxation of interstate commercial activity. *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), provides an excellent example of this concept of dissociation.

In *American Oil,* this Court rejected Idaho's attempt to impose an excise tax on gasoline sold by an oil company to the Atomic Energy Commission (A.E.C.), where the solicitation and acceptance of the sales contract occurred outside Idaho, and the delivery and transfer of title took place outside of that state, even though it was integral to the transaction that the gasoline be brought to the A.E.C.'s Idaho facility for storage by means of a common carrier. The Oil company was a licensed dealer and maintained offices in Idaho, but the Court found there was no indication that any of the in-state activities of the company contributed in any way to the procurement or performance of the A.E.C. contract. In analyzing the constitutional basis for upholding or rejecting the excise tax on the out-of-state sale, the Court stated:

> "[The] cases have also firmly established the doctrine that when a tax is imposed on an out-of-state

vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite of state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. Maryland, supra, 347 U.S. at 344-345, 98 L ed at 748. Granted that when a corporation, pursuant to permission given, enters a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances the transactions are said to be 'dissociated from local business'. Norton Co. v. Department of Revenue, supra, 340 U.S. at 537, 95 L ed at 521, [Gross Receipts Tax], and therefore may not, consistent with due process, be taxed." 380 U.S. at 458.

The California Supreme Court attempted to distinguish *American Oil* on the grounds that in *American Oil,* the seller was not "responsible" for shipping the gasoline into Idaho, whereas, in the instant suit, the Society was "responsible" for placing its mail-order merchandise into interstate commerce for in-state destination. This is a meaningless distinction. In both cases, all aspects of the *sales* were wholly out-of-state and not reachable by an in-state *sales, use* or *excise* tax. The fact that the Society used an interstate facility to ship merchandise to an in-state purchaser *after* an out-of-state sale had been completed, as opposed to the purchaser arranging for the interstate facility to ship the merchandise in-state, changes nothing. The critical

point in both cases is whether there is sufficient in-state sales-related activities of the seller to tax the out-of-state sales of that seller. This point was expressly recognized as being decisive in *American Oil*:

> "... it is plain that neither Utah Oil's possession as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale vis-a-vis Idaho and *entirely unconnected with its business in that state.*" (Emphasis added.) 380 U.S. at p. 458

So too, the advertising solicitation of the Society in California is "entirely unconnected" with its mail order sales to California customers.

The California Supreme Court has also attempted to avoid the decision in *American Oil* by stating that the concept of "dissociation" discussed in *American Oil,* an *excise* tax case, does not apply to a *use* tax case. Such a distinction is also inappropriate. The impact of a sales tax, an excise tax, or a use tax, is identical. In fact, the California Supreme Court, noting the "difficult, if not insuperable, administrative problem for the taxing state" to collect the use tax directly from each resident purchaser, refers to § 6204 of the California statute. That section provides that the tax required to be collected by the retailer constitutes a "debt" owed by the retailer to the state. Thus, the vendor is entirely responsible for the use tax to the same extent that he would be responsible for a sales or excise tax. Of course, each of these taxes is customarily passed on to the purchaser, but the liability nevertheless remains with the vendor.

The interchangability, or inter-applicability, of these sales-related taxes is apparent from a reading of the cases cited by this Court in its discussion of the principles applicable in sales-related tax cases. For example, *Miller Brothers Co.* v. *Maryland, supra,* a use tax case, was cited by the Court in *American Oil,* an excise tax case, as principal authority for the requirement that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." 380 U.S. at p. 458. In turn, *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951), a gross receipts tax case, was cited as authority for the "dissociation" test in *American Oil.* 380 U.S. at p. 458.

The California Supreme Court was totally in error in its analysis of the impact of *Norton Co.* v. *Department of Revenue, supra,* a gross receipts tax case, on a sales-related tax case. It is clear that when the language of the *Norton* case is read in context, the principle of "dissociation" articulated in that case is fully applicable to a sales or use tax case. The Court stated (340 U.S. at p. 537):

> "Unless some local incident occurs sufficient to bring the *transaction* within [the state's] taxing power, the vendor is not taxable. McLeod v. J. E. Dilworth Co. 322 U.S. 327, 88 L ed 1304, 64 S Ct 1023, 1030. Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor." (Emphasis added.)

Stating that sales and use tax cases are not *controlling* does not mean that they are not *applicable* in a gross

receipts tax case. The obvious import of this language is that the relationship of the in-state activities to out-of-state sales must be greater to sustain a gross receipts tax than it is to sustain a sales or use tax. Nevertheless, it is clear that the Court's language recognizes that the dissociation test is applicable in a sales or use tax case, just as it is in a gross receipts tax case, or, as later shown in *American Oil Co.*, in an excise tax case. Once it is recognized that the test *may* be applied to National Geographic Society's activities, there should be no question but that the Society's in-state advertising solicitation activities cannot supply the requisite nexus to impose a use tax collection liability on the Society with respect to its mail order sales.

CONCLUSION

It is clear that the Society had no retail sales-related activities in California in connection with the mail order sales here in question. No link can be established between the Society's in-state solicitation of advertising copy and the out-of-state sales, as the solicitation of advertisements had no effect upon whether California residents would purchase products of the Society which they saw announced in the magazine or in the mailed circulars. The "slightest presence" test adopted by the California Supreme Court has impermissibly extended the limits of use tax collection liability and is directly contrary to the numerous decisions of this Court to the effect that the imposition of a sales-related tax must be predicated on in-state sales activity. The "slightest presence" test would not only impose far-reaching and undesirable burdens on all retail sales made by inter-state mail, but is also clearly unconsti-

tutional. Accordingly, the decision of the lower court should be reversed.

Respectfully submitted,

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